SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 723

LAKE ERIE CATTLEMEN'S CAMP ASSOCIATION,
Petitioner,

v.

MARGARET DIXIE DAY, *et al.*, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF OHIO

CARL E. WASHBURNE
218 East Lexington Street
Baltimore 2, Maryland

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

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No.

LAKE BRADY SPIRITUALIST CAMP ASSOCIATION,
Petitioner,

v.

MARGARET DISS DIX, *et al.*, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF OHIO

The petitioner, Lake Brady Spiritualist Camp Association, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Appellate District of Ohio, a judgment which the Supreme Court of Ohio refused to review. That judgment was rendered in the above-entitled proceeding on November 20, 1963.

OPINION BELOW

No opinions were rendered in the courts below. The final judgment of the Court of Appeals for the Seventh Appellate District of Ohio, consisting of a journal entry, findings of fact and conclusions of law, is reprinted in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Appellate District of Ohio was entered on November 20, 1963. The Supreme Court of Ohio on June 3, 1964, denied a timely motion to certify the record of the case for review and decision, and sua sponte dismissed the appeal "for the reason that no substantial constitutional question exists herein." A timely application for rehearing of that action was denied on July 1, 1964. On September 23, 1964, Mr. Justice Stewart signed an order extending the time for filing this petition for a writ of certiorari to and including November 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether, consistently with the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, a state court may deprive a lessor, without compensation, of his constitutional right to lease his land on reasonable conditions and to enforce in the future all covenants of a valid 99-year real estate lease, except those pertaining to rent and taxes, solely by reason of the lessor having ignored past breaches of certain but not all such covenants.

CONSTITUTIONAL PROVISIONS INVOLVED

Sec. 1, Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner is a 75-year old religious organization dedicated to promoting the claims of modern spiritualism and the mutual interests of members and their families. It is duly incorporated under the laws of Ohio as a non-profit corporation.

Among the various stated objects of the organization is that of owning land for the purpose of holding religious exercises and meetings thereon. In furtherance of this object, the petitioner in 1902 acquired title in fee simple to certain land in Portage County, Ohio. This land, which is the subject of this litigation, was later subdivided into 67 individual lots.[1]

Between the years 1920 to 1957, about 35 of these lots were leased by petitioner on a 99-year basis to various individuals involved in this litigation. Each leasehold grant contained specific restrictions, conditions and covenants relative to the use and enjoyment of the land by the lessee during the term of the lease. Among such covenants were the following:

> (1) An obligation on the lessee to pay specified rent for a year in advance and to pay all taxes and assessments on the premises.
>
> (2) An obligation on the lessee not to use the premises for any purpose inconsistent with the general religious purposes of the lessor or inconsistent with any of the lessor's by-laws.
>
> (3) An obligation on the lessee not to use the premises for any commercial purpose unless spe-

[1] Petitioner over the years constructed a hotel, a church assembly hall, a meeting house and ten individual homes on portions of this land. All of these structures are maintained by voluntary contributions.

cifically authorized by the lessor, not to keep any boarders for hire nor furnish board or lodging for hire without written authorization, and not to use intoxicating beverages on the premises under any circumstances.

(4) An obligation on the lessee not to erect any barn or building for the keeping of animals or fowls, and not to keep animals or fowls, without specific permission by the lessor.

(5) An obligation on the lessee not to throw or discharge garbage or "kitchen slops" upon the premises or adjoining streets, and an obligation to observe the lessor's regulations concerning water closets and privies.

(6) An obligation on the lessee not to sublet any part of the premises without the lessor's written consent.

(7) An obligation on the lessee to erect "a good frame building of the assesssable value of not less than two hundred dollars" within two years of the date of the lease.

(8) An obligation on the lessee whereby "this indenture shall not be sold or transferred and the rights hereby granted, assigned or conveyed, to any person whatever upon any condition, without the written consent of said Board of Trustees."

(9) A right of the lessor "at all reasonable times to enter upon said premises and examine the same as to their sanitary and fire regulations."

Each lease further contained a forfeiture clause, providing that if the rent should remain unpaid or "if

default shall be made in any of the covenants or agreements herein contained" the lessor may thereupon rescind the indenture and declare it null and void. Upon such rescission, the lessor has the right to enter upon the premises and eject the tenants, the lessee agreeing to permit such repossession without hinderance or delay.

Originally, although not as a part of the written lease form, each applicant for a lease—as a condition to acquiring a lease—had been required to become a member of the petitioner organization and to continue in that capacity during the term of the lease. But in some instances over the years this requirement was not strictly enforced.

In 1959 the petitioner filed two actions in forcible entry and detainer in the Municipal Court of Ravenna, Ohio, to regain possession of a lot leased by Andrew Wyatt and another by Howard Fritz. It was alleged that they had breached certain covenants of their respective leases.

Shortly thereafter, however, the respondents filed the instant class action in the Court of Common Pleas, Portage County, Ohio. The complaint, making reference to the pending eviction suits against Wyatt and Fritz, alleged that petitioner was threatening to cancel all the leases and to forfeit rights thereunder "without any substantial cause therefore." Unless restrained, the complaint stated, petitioner would continue to file other eviction suits against lessees. The complaint accordingly requested that petitioner be restrained "from evicting its lease holders or from proceeding with any eviction actions already filed." A

declaration was also sought that the "said leases be declared valid and in full force and effect."[2]

Following a non-jury trial, the Court of Common Pleas enjoined petitioner from proceeding in the two pending eviction suits and further enjoined petitioner from attempting to cancel any or all leases for any reason whatsoever. Petitioner then perfected an appeal to the Court of Appeals for the Seventh Appellate District of Ohio. That court, after hearing the matter de novo, adopted findings of fact submitted by the respondents, findings which in effect found that petitioner had by its course of conduct waived all of the covenants of the leases except the covenant to pay rent and to pay taxes. Included among the covenants found to be waived were those involving the subleasing of premises, the assignment or transfer of leases and the mortgaging of buildings, as well as the maintenance of membership in the petitioner organization. And petitioner was further found to have waived its rights "to inspection, sanitary conditions, and appearances of the houses on the leased premises." See pp. 3a-4a, *infra*.

The Court of Appeals thereupon concluded, as a matter of law, that the petitioner "by its course of conduct during the continuance of the leases and over many years waived all of the covenants of the leases except the covenant to pay rent and to pay taxes." By virtue of such waiver, the court concluded that it would not enforce "the forfeiture provisions of the leases nor the restrictions or restraints against assignments,

[2] A second cause of action was alleged, the claim being that the petitioner was insolvent and guilty of certain ultra vires acts. A dissolution of the corporation and a distribution of assets were sought. But this second cause of action was later withdrawn by the respondents and is no longer in issue.

alienations or hypothecation." Further, the court concluded that "the leases are valid and in full force and effect" and that the lessees "are entitled to peaceable enjoyment of their respective premises under the leases except to the provision for payment of rent and payment of taxes." See pp. 4a-5a, *infra.*

Having found that a waiver had occurred and that the penalty and forfeiture clauses of the leases could not be enforced, the court awarded a permanent injunction against petitioner evicting the lessees or persons holding under the lessees. See pp. 1a-2a, *infra.*

The Supreme Court of Ohio, in the exercise of its discretion, declined to review the action of the Court of Appeals.

RAISING THE FEDERAL QUESTIONS

Only after the Court of Appeals, hearing the case de novo, went beyond the prayer for relief and entered a judgment voiding all the leasehold covenants save those relating to rents and taxes did the federal constitutional issues become evident. Petitioner thereupon applied to that court for a rehearing, asserting that the decision operated to deprive petitioner "of said real property without due process of law as quaranteed by the 14th Amendment of the United States Constitution, and Article I, Section 16 of the Constitution of Ohio." Petitioner further requested that this constitutional question be incorporated in the court's journal entry.

While the Court of Appeals denied rehearing without comment, Presiding Judge Paul W. Brown of that court has signed a certificate, which is part of the record before this Court, that upon the appeal there were presented and necessarily considered and denied

by the Court of Appeals the following federal constitutional questions raised by petitioner:

> "1. That the non-enforcement of the covenants in the covenants in the leases in the future denied their rights under the Equal Protection Clause of the Fourteenth Amendment.
>
> "2. That such non-enforcement confiscated their property contrary to the Due Process Clause of the Fourteenth Amendment.
>
> "3. That such non-enforcement constituted an arbitrary interference with and impairment of existing lease contracts."

The Supreme Court of Ohio, exercising its discretionary powers, declined to review the judgment of the Court of Appeals and dismissed the appeal for lack of a substantial constitutional question, the foregoing Federal constitutional issues having been presented to it.

REASONS FOR GRANTING THE WRIT

The decision below, voiding nearly all the covenants designed to protect a lessor's legitimate concerns in leasing land for 99-year terms, raises significant and novel issues under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. So universal is the practice of inserting protective covenants in such long term leases that the arbitrary destruction of those covenants by the court below must be viewed as an ominous threat to the constitutionally protected rights of all lessors in the United States, a threat that fully warrants the invocation of this Court's review powers.

1. It is axiomatic, of course, that among the essential attributes of real property protected by the Fourteenth

Amendment are "the rights to acquire, enjoy, own and dispose of property" for lawful purposes. *Shelley* v. *Kraemer,* 334 U.S. 1, 10; *Terrace* v. *Thompson,* 263 U.S. 197, 215. The landowner has the constitutional right "to devote its land to any legitimate use" and neither a state legislature nor a state court may "impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 121. Hence petitioner had the constitutional right to impose reasonable and lawful conditions and covenants in leasing its land for 99-year terms.

2. In this case, however, a state court has directly and arbitrarily impinged upon that constitutional right. None of the various covenants in the leases in question has been found unreasonable or unlawful; indeed, the court found the leases to be "valid and in full force and effect." But based solely on a finding that in the past breaches of *certain* of those covenants had been ignored, the court has held that *all* the covenants—save those relating to rent and taxes—must be considered waived and unenforceable for the remainder of the 99-year terms. And it has held that even those covenants which had not been breached in the past must be considered unenforceable in the future. Thus petitioner has been deprived of the right to enforce such hitherto unbreached covenants as those barring commercial activity, barring the keeping of animals or fowl, or barring other activities inconsistent with the religious nature of the petitioner organization.

Such a determination must be viewed as a purely arbitrary one, unrelated to any rational interest of the state or of the lessees. Concededly, a landlord may so

act as to waive a particular breach of a covenant, thereby estopping himself from asserting any right of forfeiture stemming from that breach. But it is universally recognized that "the mere fact that the landlord has failed to enforce a forfeiture on a previous breach of a condition, without more, should not be regarded as a license to commit subsequent breaches thereof." 2 Tiffany, Landlord and Tenant (1910), p. 1397.[3] As stated in 1 American Law of Property (1952), § 3.95, p. 384, "If the condition is one which permits of continuing or recurring breaches, then a waiver as to one breach does not prevent the lessor from asserting a forfeiture for later breaches." And see *Plassmyer* v. *Brenta,* 24 N.J. Super. 322, 330, 94 A. 2d 508, 512-513; *London* v. *Tebo,* 246 Mass. 360, 141 N.E. 234; *Extension Oil Co.* v. *Richfield Oil Corporation,* 52 Cal. App. 2d 105, 125 P. 2d 895; *One University Place, Inc.* v. *Egan,* 158 N.Y. Supp. 2d 823; *Ocean Grove Camp Meeting Assn.* v. *Sanders,* 68 N.J.L. 631, 54 A. 448. In short, to use the words of the New Jersey court in *East Orange* v. *Board of Water Commissioners,* 194 A. 2d 459, 466, the doctrine that a waiver of one breach does not preclude a forfeiture for future breaches "is accepted generally throughout the country." That doctrine has been one of the means employed to maintain the federal constitutional rights of lessors in conditioning the leasing and usage of their lands.

The arbitrariness of the decision below is underscored by the failure to allow the lessor's knowl-

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[3] Tiffany further states (p. 1397): "Why an exercise of the landlord's option not to enforce a forfeiture for breach of condition should have the effect of a license to commit another breach is by no means clear."

edge or intention to play any role as to *future* breaches of covenants. Petitioner has been held, solely because of certain past waivers, to have waived all future breaches. Yet, waiver, "in any normal sense," necessarily "connotes some kind of voluntary knowing relinquishment of a right." *Green* v. *United States,* 355 U.S. 184, 191. To decree that a lessor without regard to his intention or knowledge has waived the right to insist in the future upon compliance with his constitutionally protected property interests is to indulge in an arbitrary act, one that is condemned by the Due Process Clause.

3. To hold that a lessor, by reason of a waiver of certain past breaches, has forfeited all right to protect himself against future breaches by a lessee, including breaches of covenants not previously violated, is in effect to hold that the lessor has lost much if not all of his constitutionally protected right to lease or to authorize the use of his property on such legitimate conditions as he may see fit. The intolerable result—and one that is barred by the Due Process Clause—is to take away one man's property right and give it to another, without compensation or consideration. See *Osborn* v. *Nicholson,* 13 Wall. 654. The lessee is here given the lessor's valuable right to determine the nature and conditions of the land usage, such as when and under what conditions a lease may be assigned or the premises subleased. Yet that right is among the bundle of property rights protected by the Fourteenth Amendment, a right that cannot be arbitrarily and without compensation awarded to another person.

4. The Due Process Clause of the Fourteenth Amendment precludes a state legislature or a state

court from arbitrarily decreeing that a plot of land owned by A shall henceforth be vested in B. *Savings & Loan Assn.* v. *Topeka*, 87 U.S. 655, 663; *Davidson* v. *New Orleans*, 96 U.S. 97, 102; and see *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 120-121. By the same token, the Due Process Clause precludes a state court from arbitrarily decreeing that a property right which is vested in A as lessor of a plot of land shall henceforth be vested in B. *Cf. Osborn* v. *Nicholson, supra.* Therein lies the constitutional vice of the decision below. The lessor's right to determine and enforce the conditions of the lease of his land has been confiscated and given to the lessee, without compensation and without regard to the lessor's knowledge or intention.

5. Similarly, the Equal Protection Clause of the Fourteenth Amendment bans any irrational or unreasonable classification in the application of state law. *Morey* v. *Doud*, 354 U.S. 457, 465; *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527. Yet in this case the Ohio judiciary has created an invidious distinction between lessors with respect to their right to enforce covenants in their long-term leases. Those who have waived or ignored past breaches of certain covenants are treated as having waived the right to insist upon future compliance with virtually all covenants, including covenants not previously breached, while those lessors who have not previously waived a breach remain free to enforce all covenants in the future. Such a distinction with respect to future breaches finds no warrant in the law, in logic or in the practicalities of landlord-tenant relationships. See 2 Tiffany, Landlord and Tenant, *supra.* Up until now even Ohio jurisprudence has refused to recognize such

a distinction.[4] But the decision below has established a new and dangerous precedent, one that cannot be squared with the principles of the Equal Protection Clause.

This Court has held, moreover, that "Equality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." *Shelley* v. *Kraemer*, 334 U.S. 1, 10. And fundamental to the equal enjoyment of those property rights is equal access to state or federal courts to enforce the terms of reasonable and non-discriminatory covenants of leases. *Ibid.*, 22. "The equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination." *Sexton* v. *Barry*, 223 F. 2d 220, 224 (C.A. 6); and see *United States* v. *Schultz*, 150 F. Supp. 303 (S.D.N.Y.), affirmed 243 F. 2d 349 (C.A. 2).

In this case, however, the court below has barred petitioner from seeking the aid of any court to enforce in the future any covenant that may be breached, except those relative to rent and taxes. Petitioner has been "permanently enjoined from evicting or attempt-

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[4] See 33 O. Jur. 2d § 427, P. 682: "If a covenant in a lease is not a continuing one, a waiver operates to prevent any future claim of forfeiture. However, if the covenant is of a continuing nature, a waiver of one breach does not preclude a forfeiture for subsequent breaches." The case of *Hub Bldg. & Loan Co.* v. *Stone*, 28 O.L. Abs. 82 (App.), is cited in support of that summary.

Further, § 280, p. 55, of 33 O. Jur. 2d states: "As a rule, consent by the lessor to an assignment does not preclude his right to forfeit the lease because of a subsequent assignment without his consent, in violation of a provision in the lease against assignment without the consent of the lessor."

ing to evict the lessees, or persons holding under said lessees," no matter how egregious the future breach of covenant may be. Even the covenant in the lease, giving the lessor the right to regain possession upon the termination of the leasehold estate, has been found to have been "waived" by petitioner and to be unenforceable.

No other class of lessors is subject to such a closing of all judicial relief for future breaches of leasehold covenants. Such discriminatory action by the Ohio court must be viewed as a denial of equal protection; and the complete arbitrariness of that action must be viewed as a denial of due process of law.

CONCLUSION

This case represents something far more significant than a parochial application of state law relating to landlord-tenant relationships. The decision below cuts deeply and arbitrarily into the constitutionally protected rights of all lessors in the nation. Unless this Court intervenes, the States will consider themselves constitutionally free to strike down those rights whenever the lessor has for one reason or another ignored or tolerated a past breach of covenant.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL E. WEINGARTEN
218 East Lexington Street
Baltimore 2, Maryland

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner